

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.288 OF 2000

Dhiru Manji Dharoliya	]
Age : 34 yrs. r/at Indira	]
Nagar Zopadpatti, Patharli	]
Dombivli, Dist.Thane	]..Appellant
	[Ori.Accused]

Vs.

The State of Maharashtra	]
(At the instance of	]
Dombivli Police Station,	]
Dist.Thane	]..Respondent

...

Mr. Ganesh Gole Advocate for Appellant
Mr. A.M.Shringapure A.P.P. for State

...

**CORAM: N.V.DABHOLKAR AND
SMT.V.K.TAHILRAMANI, JJ.**

DATE : JANUARY 13, 2006

ORAL JUDGMENT (PER N.V.DABHOLKAR, J.):

1. Additional Sessions Judge Kalyan at the conclusion of the Sessions Case No.96 of 1998 found the appellant-accused guilty for the offences under Sections 452 and 302 of IPC. The learned Sessions Judge has sentenced the appellant to suffer life

imprisonment and fine of Rs.2000/- i.d. R.I. for six months for the offence of murder and R.I. for five years and fine of Rs.500/- i/d R.I. for one month for house trespass. This judgment of conviction and sentence is being challenged by the appellant vide this appeal under Section 374(2) of Code of Criminal Procedure 1973.

2. The prosecution story can be narrated in brief as follows:

. The incident in question took place on 6.9.1997 between 18.30 to 19.00 hours at the residence of complainant in locality called 'Sanjay Nagar Zopadpatti' of Dombivali (East). The victim of the incident viz. Ambalal Solanki was father-in-law of accused-appellant Dhiru. At the alleged place and time, accused-Dhiru is said to have stabbed Ambalal to death in his house (Ambalal's house) and ran away and hence, charge for the offence punishable under Sections 452 and 302 of IPC was framed against him.

. On reference to evidence of P.W.1 Kuwarbai (widow of the deceased Ambalal) and P.W.2 Shankar

(brother of deceased) both of them narrated the story of accused having picked up quarrel with P.W.2 Shankar as also with the son of the deceased viz. Prakash (P.W.4). Quarrel with Shankar took place because of differences in settlement of account of the business of flower sale. No cause is offered for quarrel with Prakash. It is also alleged that during the course of both the quarrels, accused had threatened of dire consequences by expressing that he will make them cry by that night. It is narration of Kuwarbai that accused had approached her husband (deceased) complaining about Shankar and had requested the deceased to advise Shankar to behave properly, although Kuwarbai has not described many details of the dispute or reasons for the dispute between Shankar and the accused. According to Shankar, accused started abusing him because Shankar demanded his share of profits arising out of the business of the flower sale.

. At the conclusion of the trial, by impugned judgment, the learned Sessions Judge found the appellant guilty of both the charges and he has convicted and sentenced the appellant as described

hereinabove.

3. Apart from widow of the victim viz. Kuwarbai (P.W.1) and brother of victim Shankar (P.W.2) who are referred hereinabove, while describing the prosecution story, Rekha daughter of Shankar Solanki examined as P.W.3 is the star witness of the prosecution. According to her evidence, she had seen accused running out from the residence of the victim and at that time, he was carrying blood stained knife in his hand. It is also the claim of Rekha that she entered the house and ascertained that Ambalal was lying injured due to stab injuries immediately after departure of accused from the house of victim. P.W.4 Prakash is the son of deceased. His evidence is mainly about the quarrel that was picked up with him by the accused in the afternoon. He was informed about his father being assaulted and injured by the accused, while he was at the market place. By the time he returned home, it was necessary to arrange for a vehicle for transporting his father to Hospital which he did and Ambalal was declared dead by Doctor at Laxmi Hospital.

. Remaining four witnesses of the prosecution are

formal witnesses who have assisted the investigation. P.W.5 Ashok and P.W.6 Vishnu are panchas. It is the claim of the prosecution that blood stained clothes and weapons were discovered at the instance of information given by accused in presence of these two panchas (Memorandum of Statement of accused and Panchanama are at Exhibit-20 and Exhibit-20A). P.W.8 Dr.Ashok Bhide had performed post-mortem (P.M.Report at Exhibit-11) and he has opined that death of Ambalal was caused because of 'haemorrhagic shock due to injuries to vital organs'. Dr.Deepak Gupta (P.W.9) was Medical Officer attached to Shastri Nagar Hospital. He had clinically examined the accused immediately after arrest and injuries noticed on the person of the accused are certified by Exhibit-31.

4. In this matter, accused has examined couple of witnesses in his defence. Apart from total denial of being author of the injuries upon the person of the victim, accused has pleaded *alibi* and defence evidence is aimed at establishing the same. D.W.1 Anita Shinde is infact daughter of the deceased. She is sister-in-law of the accused, wife of

accused being her sister. She has deposed that when they learnt news about assault upon Ambalal, she was at market place and she along with her sister Hansa, accused Dhiru and Rekha together had come home in a rickshaw and by the time they reached home, Ambalal was already shifted to Hospital. D.W.2 Lilabai is infact a resident of vicinity and would have been a prosecution witness. It is the claim of Rekha that Lilabai shouted and called her, when Rekha saw the accused running out from the house of victim. For the reasons best known, the prosecution did not examine Lilabai. The defence has examined Lilabai as second witness and Lilabai served no purpose of the defence. However, her cross-examination ended with some benefit to prosecution when she deposed that "it is true that I had asked Rekha to go and see what had happened in the house of Ambalal".

5. Heard learned advocate Shri.Ganesh Gole for the appellant and learned A.P.P. Shri.Shringarpure for the State. Shri.Gole has strenuously taken us through evidence of witnesses so also the impugned judgment.

. On reference to judgment of the trial Court, it can be seen that paragraphs 12 to 21 are utilised to describe the evidence rendered by each and every prosecution witness one by one. Learned Judge has also described the evidence of defence witnesses Anita and Lilabai in paragraphs 23/23 and 24/25. He commenced discussion of his reasons for his findings in the real sense from paragraph 27 onwards. The trial Judge has disbelieved the version of defence witness Anita Shinde to the effect that accused was with her when she along with Hansa and Rekha returned home upon getting intimation about Ambalal being stabbed at home. This is because material supporting such version is neither suggested nor brought on record by the defence during the course of cross-examination of any of the prosecution witnesses. According to learned trial Judge, the defence is raised at a belated stage and without obtaining supporting material in the form of admission by prosecution witnesses. That relationship of Anita with parents was strained relationship is another reason why the trial Judge feels that she is motivated to depose contrary to the case tried to be made out by her parents.

. So far as claim of the prosecution that his own blood stained clothes and the weapon of the offence stained with human blood, were discovered at the instance of information given by the accused, the trial Judge was not inclined to place reliance upon panch witness Ashok (P.W.5). However, he found the fact of discovery having been firmly established on the basis of other panch witness Vishnu and Investigating Officer Shri.Thombre (P.Ws.6 and 7). In fact, the trial Judge was not inclined to accept any of the submissions advanced by the defence for submitting that the prosecution witnesses are unreliable. The trial Judge has believed P.Ws.1, 2 and 4 i.e. widow, brother and son of the deceased for background quarrels and held that motive is established by the prosecution. This is because three witnesses viz. Kuwarbai, Shankar and Prakash have narrated that at the conclusion of afternoon quarrel, accused departed by according threats to the effect that he will make these people cry by night time. The trial Court therefore felt that prosecution has established motive on record and the motive was the quarrel on issue of money between Shankar and accused in the afternoon.

. Accepting the deposition of Prakash (P.W.4) that he was hunting for accused-Dhiru at Dadar & Kandivali & ultimately, he was found at the place of his sister at Kandivli, the trial Judge has believed that accused had absconded immediately after the incident and this is accepted as one of the circumstances supporting the prosecution. The trial Judge was also not inclined to disbelieve the evidence merely because P.Ws.1 to 4 are closely related to the victim.

. To sum up, it can be said that the learned trial Judge held prosecution case proved on the basis of following chain of circumstances:

- i) Quarrel in the afternoon between accused and Shankar as also accused and Prakash at the conclusion of which, accused had accorded threats of dire consequences (motive);
- ii) Rekha having witnessed the accused running out from the residence of

the victim with a knife stained with blood/Rekha having seen victim lying in an injured condition, soon after departure of accused;

- iii) Discovery of blood stained clothes and weapon at the instance of information given by the accused;
- iv) Reports of analysis showing that clothes of the victim and clothes of accused are stained with human blood group 'O' whereas blood group of the accused is 'AB' and therefore, inference is possible that weapon and clothes of the accused are stained with blood of the victim;
- v) Death to be homicidal (evidence of P.W.8);

6. At the commencement of his arguments, Advocate Shri.Gole made it clear that defence does not wish

to challenge one circumstance i.e. the death of Ambalal being homicidal. He pointed out that defence has not very seriously challenged evidence of Dr.Ashok Bhide except by suggesting that the incised injuries as noticed by the Medical Officer on the person of the victim could be possible by any other weapon as well other than the Article-3 that was placed before the Court.

. Shri.Gole vehemently argued against the claim of the prosecution that motive is established. He seriously challenged the evidence regarding discovery of weapon. According to him, the motive is not established because on considering the evidence of Kuwarbai, Shankar and Prakash, it can be seen that their narrations make out practically different stories than each other. They are totally descriptant with each other. About discovery, he compared the depositions of Investigating Officer and Panch Vishnu with the Memorandum and Panchnama in order to submit that both the witnesses do not know the correct details in the panchnama which is an indication of the fact that Memorandum Panchnama and discovery are not reliable pieces of evidence, but probably those are

engineered evidence. So far as deposition of Rekha is concerned, according to Advocate Shri.Gole, the same is also unreliable. He thus claimed that accused is at least entitled to benefit of doubt, if not a clean chit.

. Learned A.P.P. Mr.Shringarpure has followed the same line of reasonings, as adopted by the trial Court; during the course of his arguments and according to learned A.P.P. Shri.Shringapure, even if Rekha alone is believed to have witnessed the exit of the accused from the house of victim soon after the incident and armed with blood stained weapon, that should suffice the purpose to draw an inference that accused and accused alone must have committed the murder. Whatever support such version requires, is available, according to learned A.P.P. in the form of report of analyser, which indicates that the stains of blood on the clothes of accused and on the weapon of the offence were that of blood group to which the victim belonged.

7. We intend to consider the evidence on record one by one in order to appreciate whether the

circumstances are established with firmness and on the foundation of cogent evidence. It may not be out of place to say that having gone through the judgment of the trial Court, we feel that it has not given due importance for the purpose of discussion, to the points which support the defence to some extent. The learned Judge has rejected contention of the defence that P.Ws. 1 to 4 may be disbelieved merely because they are interested witnesses. However, he has not considered the stories narrated by them threadbare, on the basis of which he arrived at the conclusion that prosecution has successfully established motive for the accused to commit murder of Ambalal.

. Accepting the prosecution story as it is, if at all there was quarrel between Shankar and accused on the point of sharing profits of flower business, accused as son-in-law of Ambalal expected Ambalal to intervene and persuade Shankar. Ambalal had assured accused to persuade Shankar to be fair. If this is the prosecution story, we are unable to appreciate availability of any reason for grudge in the mind of accused of such acidic extent that accused desired to kill Ambalal within a couple of

hours since this afternoon quarrel.

. Having gone through the evidence of Kuwarbai, Shankar and Prakash, accusation of learned counsel for the Appellant that they are narrating afternoon quarrel in so much discrepant manner that one feels that they are narrating a different incident, is required to be upheld. According to Kuwarbai, the quarrel erupted in the courtyard, accused Dhiru entered the house and was requesting Ambalal to persuade Shankar and Shankar was observing this from the entrance door of the house of Ambalal. Deposition of Kuwarbai gives an impression that Dhiru was complaining of non-payment of profits by Shankar. An inference can be drawn that according to description given by Kuwarbai, profits of flower business were in the custody of Shankar and Dhiru, if that be the correct position, he being the son-in-law, was enraged and was trying to persuade his father-in-law to intervene. As against this, when we refer to the deposition of Shankar, he says that all amount of business was in the custody of Dhiru (accused) and Dhiru picked up quarrel because Shankar demanded his share. If that be so, i.e. Dhiru was denying any payment to Shankar, it should

have been Shankar to approach Ambalal with a request to persuade Dhuru. The situation could not have been the way it is narrated by Kuwarbai.

8. It is the claim of the prosecution that accused not only picked up the quarrel with Shankar and Ambalal in the residential locality but by going to market place, he physically beat Prakash. On reference to deposition of Prakash, he claims that at about 4 or 5 p.m. while he was at a business place, accused came there and kicked him in the back. When Prakash questioned reason for beating, accused on the contrary, physically lifted Prakash and threw him on the ground. According to Prakash, he was rescued by his maternal cousin namely Anil. According to Prakash, arrival of uncle Shankar at the scene, was at a belated stage. This was only after the accused stopped beating him and sat near the Chetan Medical Stores in front of his business place. When Shankar arrived with his wife, he questioned accused as to why he was creating quarrels and according to Prakash, it was at that juncture, accused lifted weight of 2 kgs. and tried to assault uncle Shankar. If we refer to the

deposition of Shankar, he narrates a totally different story than Prakash about this quarrel at market place. According to Shankar, after initial quarrel in front of the house of complainant, while he was at his residence, Rekha came and informed him that Dhiru was beating her brother Prakash. (if this version of Shankar is to be accepted, it can be seen that Rekha was at the market place and she had come to Shankar to inform about the quarrel between accused and Prakash). According to Shankar when he reached market place, quarrel between Prakash and Dhiru was still on and he tried to rescue Prakash and accused assaulted him with 2 kgs. weight. Unfortunately for the prosecution, Prakash does not agree with uncle Shankar that uncle had come to rescue Prakash. In fact this narration by Shankar is followed by a sentence "Dhiru went to market in rickshaw". If this statement is guideline the incident between Prakash and Dhiru, it will have to be presumed to have taken place not at the market.

. We are convinced on going through depositions of Kuwarbai, Shankar and Prakash that their evidence about the background quarrels which are believed by

the learned Judge as "motive" is not acceptable and we are inclined to record a finding that prosecution has not established any motive on record. In fact, A.P.P. Shri.Shringarpure after some interaction fairly conceded this point.

9. So far as discovery at the instance of the accused, the trial Judge himself has aborted evidence of P.W.5 Ashok as not convincing and we therefore, do not wish to discuss the same. The learned trial Judge felt the evidence of Vishnu to be convincing together with that of Investigating Officer Bapu Thombre. Having gone through Memorandum (Exhibit-20) and Panchnama (Exhibit-20A), we are inclined to agree with the trial Judge and disagree with the learned counsel for the Appellant that Memorandum does not make any reference to place of hiding. No doubt the description is too cryptic. Memorandum only indicates that accused suggested the clothes and weapon to have been concealed in his own room. In fact, it is the claim of the prosecution that clothes were discovered from the room and weapon from the heap of waste material outside the room/near the room owned by the accused.

. When we refer to Panchnama, it is recorded that the police party along with panchas and the accused went to the place of accused and initially it went inside the house. The house has a wooden loft. The same is required to be approached by using a ladder and it is stated that accused climbed to that loft by the ladder and he came out with "suit-case". Thereafter, accused came out and from the heap of waste material (Takau saman thevalelya dhigaryat), he recovered the pen knife stained with blood. In this context, when we refer to the evidence of panch witness Vishnu, he is unaware of the details such as loft, ladder which was required to be used for climbing into the loft and the suit-case. He has deposed in too general terms that accused produced the clothes from a box in the room. According to him, the knife was recovered from the heap of bricks in front of the house of the accused. Similar is the calibre of evidence of Investigating Officer Shri.Thombre. He has further contradicted the panch witness by saying that the knife was concealed in the sand in front of the house. He also makes no reference to the loft and ladder and

he neither refers to the suit-case nor to the box as container from where the blood stained clothes were retrieved.

. It must be said that the evidence regarding discovery of blood stained clothes and weapon at the instance of accused, does not inspire confidence because the Investigating Officer and Panch witness have faltered at crucial points. For the reasons discussed hereinabove, we are inclined to disagree with the trial Court that evidence regarding discovery is convincing or that prosecution has established discovery of his own blood stained clothes and blood stained knife at the instance of information given by the accused.

. It may not be out of place to say that we have been in a position to read the report of analysis after a long time wherein blood group of victim and accused and on all the articles, is established. Ordinarily, there is frequency of reports wherein results of the analysis for determination of blood group are inconclusive. If reports of analysis are to be considered, it can be said that prosecution has established that all the clothes and weapon

having been stained with human blood group 'O' and that accused is a person of blood group 'AB'. Had the prosecution been able to convince the Court of discovery of three articles at the instance of the accused, it could have been said that prosecution has successfully proved that the clothes of the accused and weapon were stained with human blood of the same group as that of the victim. When we are finding the report and evidence on record to be unreliable, the report of analysis loses its value and importance.

. The learned A.P.P. Shri.Shringarpure has urged that even if Rekha alone can be believed on the point that she had seen the accused exiting from the residence of the victim with a blood stained weapon and thereafter when she entered the house, victim Ambalal was found lying in an injured condition, this simple piece of evidence is sufficient to draw an inference that it must be accused and noneless, who had inflicted the injuries upon the victim. The argument would be justified to some extent because evidence of prosecution to the effect that Ambalal was alone at home, is not much under challenge. Learned A.P.P.

would have been justified in standing upon such a proposition, if Rekha was a reliable witness. It is the claim of Advocate for the Appellant that evidence of Rekha is not reliable. In the deposition for the first time, Rekha made out a case that she saw the accused opening the door of the house of Ambalal and then running away. Admittedly, she had not narrated in her police statement to have seen accused Dhiru opening the door. No doubt, the contradiction is limited to the action of opening the door, as is evident from the denial on the part of Rekha the suggestion to the effect that she had not seen accused running away with the knife. But fact remains that Rekha is willing to improve on a crucial aspect. According to chief examination of Rekha, she had come home in the afternoon. It was one Lilabai who called her and informed her that she had heard some shouts from the house of victim Ambalal and suggested her that she should go there. It is at this juncture Rekha saw the incident. Rekha is not precise about the time factor but according to her narration in the examination-in-chief, incident is required to be inferred to have occurred in the afternoon. If we refer to the evidence of

Kuwarbai, background quarrels had taken place prior to 3.30 p.m. and Rekha had come to give her message in the market at about 4.45 p.m. to 5.00 p.m. Thus, the incident might have occurred at 4.30 p.m. If we refer to F.I.R. (Exhibit-13), according to complainant, Rekha had reached at the market place for informing about Ambalal being injured at about 7.00 p.m. Prosecution has nowhere explained this gap of three hours. If F.I.R. is to be accepted, the incident could not have occurred before 6.00 p.m. (since it is the claim of Rekha that soon after having witnessed the departure of accused and injuries on Ambalal, she had proceeded to market place in a rickshaw. If evidence of Rekha is to be accepted, the incident has occurred some time at about 3.30 p.m. and in that case, prosecution is obliged to explain the delay in lodging the F.I.R. which is registered only at 20.30 hours (8.30 p.m.).

. When we refer to cross-examination of Rekha, in the afternoon, she herself, her mother, her father (Shankar) and Dhiru (accused) had returned home from Bazar at about 3.00 p.m. She adds that "at that time there was no quarrel". According to us,

this admission of Rekha is fatal to the prosecution. This admission indicates that there was no incident in the afternoon and thus falsifies the depositions of Kuwarbai and Shankar who narrated the afternoon quarrel involving the accused, Shankar, victim and Kuwarbai and which is tried to be used by the prosecution as background incident-cum-motive. If as narrated by Rekha, the main incident of stabbing Ambalal had taken place after she returned home in the afternoon, this admission is capable of cutting across that version. By relying upon this admission of Rekha, we are not suggesting that no incident had occurred. The admission on the part of Rekha is only capable of suggesting that version of Rekha of being present in the locality when the incident occurred, may not possibly be true. There is a room to look to her deposition with suspicion and if she was not present in the locality, she could not have seen the accused running out from the entrance door of the victim's house.

. We are therefore inclined to agree with learned advocate for the Appellant and disagree with the learned trial Judge that Rekha has rendered very

convincing evidence.

10. In the matters based on circumstantial evidence, the parameters laid down by the Supreme Court are required to be remembered. Prosecution is required to establish all the circumstances which together should leave no other hypothesis open except that of guilt of the accused. In the matter at hands, if we were to believe deposition of Rekha, the evidence regarding discovery together with report of analysis such a chain could have been said to have been established. But since we feel that evidence on the point of motive is totally unreliable, evidence on the point of discovery is possibly engineered and evidence of Rekha is doubtful, we must say that prosecution has travelled only upto destination "may be true" but not to the target "must be true". In the circumstances, the accused is entitled to benefit of doubt.

. In the result, appeal is allowed. Judgment and Order dated 3.4.2000 delivered by Additional Sessions Judge, Kalyan in Sessions Case No.96 of 1998 holding Appellant-Dhiru Manji Dharoliya guilty

for the offences punishable under Sections 452 and 302 of IPC, is quashed and set aside. He is acquitted of all the charges levelled against him. He be set to liberty forthwith, if not required in any other case.

. Registrar (Judicial) shall ensure early dispatch of appropriate writ.

[N.V.DABHOLKAR, J.]

[SMT.V.K.TAHILRAMANI, J.]